CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. [illegible] 183

UNION PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

JAMES J. E. BURKE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

[illegible]

(27,983)

(27,323)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 568.

UNION PACIFIC RAILROAD COMPANY, PETITIONER,

vs.

JAMES J. E. BURKE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

	Page.
Remittitur from court of appeals	1*a*
Record on appeal to court of appeals	1
Statement under rule 41	1
Agreed statement of facts	2
Exhibit A—(Front) Bill of lading	7
A—(Back) Bill of lading	8
B—Western classification	9
B—Rules and conditions	11
B—East-bound import tariff No. 36-*a*	16
B—Exceptions	18
Affidavit of James J. E. Burke	21
Stipulation as to record	22
Order of appellate division	23
Opinion of appellate division	24
Judgment	30
Order granting leave to appeal	32
Notice of appeal	33
Stipulation as to record	34
Clerk's certificate	35
Opinion of court of appeals	36
Order of appellate division	49
Clerk's certificate	51
Judgment	53
Clerk's certificate	54
Writ of certiorari and return	55

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1920.

COURT OF APPEALS.

STATE OF NEW YORK.

Pleas in the Court of Appeals held at Court of Appeals Hall in the City of Albany on the 15th day of July in the year of our Lord one thousand nine hundred and nineteen before the Judges of said Court.

Remittitur, July 16, 1919.

Witness,

THE HON. FRANK H. HISCOCK,
Chief Judge presiding,
R. M. BARBER, Clerk.

Order of Court of Appeals.

JAMES J. E. BURKE,

Appellant,

—against—

UNION PACIFIC RAILROAD COMPANY,

Respondent.

BE IT REMEMBERED that on the 3rd day of January in the year of our Lord one thousand nine hundred and eighteen JAMES J. E. BURKE, the appellant in this cause came here into the Court of Appeals, by Tipple & Plitt, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in

4-a *Order of Court of Appeals.*

and for the First Judicial Department. And Union Pacific Railroad Company, the respondent in said cause afterwards appeared in said Court of Appeals by Harrington, Bigham & Englar, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Arthur W. Clement of Counsel for the Appellant and by Mr. Oscar R. Houston, of counsel for the respondent
5-a and after due deliberation had thereon did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and judgment granted in favor of plaintiff and against defendant for the sum of $17,549.01 with interest from March 10, 1915, with costs in this Court as in the Appellate Division.

And it was also further ordered that the record aforesaid and the proceedings in this Court be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according
6-a to law.

Therefore it is considered that the said judgment be reversed and judgment granted in favor of plaintiff, etc., as aforesaid.

And hereupon as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises are by the said Court of Appeals remitted into the Appellate Division, First Judicial Department, before the justices thereof, ac-

cording to the form of the statute in such case made and provided to be enforced according to law and which record now remains in the said Apellate Division before the justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE.
Albany, July 16, 1919.

8-a

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein attached thereto.

R. M. BARBER,
Clerk.

[SEAL]

9-a

1

Supreme Court,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

2

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Statement Under Rule 41.

This action was begun by the filing of the case, submission and affidavit in the office of the Clerk of the County of New York on the 18th day of January, 1917, pursuant to Section 1280 of the Code of Civil Procedure. The names of the original parties are James J. E. Burke, plaintiff, and Union Pacific Railroad Company, defendant. There have been no changes of parties or attorneys.

3

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Agreed Statement of Facts.

The above-named plaintiff, of full age, a citizen of the United States, and a resident of the County of New York, and above-named defendant, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, hereby, for the purposes of this action and submission only, agree upon the following facts upon which the controversy between them depends and hereby submit the same to this Court for decision:

I. At all the times hereinafter mentioned the defendant was a common carrier for hire engaged in the transportation of property.

II. On or about March 10th, 1915, at Yokohama, Japan, a foreign country, the firm of S. Ontra & Brother delivered to the Pacific Mail Steamship Company for transportation, certain property consisting of 56 cases drawn work goods and Renaissance consigned to New York, New York, to be there delivered to the shippers' order, notifying S. Ontra & Brother, 425 Broadway, New York, and at said time and place of shipment the Pacific Mail Steamship Company deliv-

ered to said S. Ontra & Brother, a bill of lading, a copy of which is attached hereto, marked Exhibit A, and made a part hereof, which was duly accepted by S. Ontra & Brother.

III. At said time and place of shipment no freight was paid upon said shipment but said bill of lading Exhibit A shows as collect freight the sum of $507.02, made up as follows: *Ocean freight* at the rate of 50 cents per hundred pounds based on the weight of said shipment of 26,404 pounds or a total of $132.02, ocean freight from Yokohama to San Francisco, and *rail freight* at the rate of $1.25 per hundred pounds, based upon a minimum carload weight of 30,000 pounds, or a total of $3.75 rail freight, from San Francisco to New York.

IV. Thereafter said Pacific Mail Steamship Company duly transported said property to the Port of San Francisco, California, a port of entry in the United States where it delivered said property to the Southern Pacific Company, a common carrier, and said Southern Pacific Company thereupon transported said property to its point of Junction with defendant's line, at which place it delivered said property to the defendant.

V. At said time and place, the defendant duly accepted and received said property as a common carrier for hire and as the next connecting carrier and the defendant then undertook and agreed to transport said property from the point at which it received the same as such connecting carrier as far towards New York as defendant's railroad extended, and to then and there deliver

10 *Agreed Statement of Facts.*

the same to the next connecting carrier on the route to New York.

VI. The whole of said property to wit: Said fifty-six original cases and their contents was totally destroyed at or near Rawlins, Wyoming, while said property was in the hands of the defendant, as a carrier as above set forth and was wholly lost to said firm of S. Ontra & Brother, the owner thereof, and was never received or delivered at New York.

11

VII. Said fifty-six cases contained at the time of their said loss a quantity of drawnwôrk and Renaissance of the fair, reasonable invoice and market value of $17,549.01 and the property of S. Ontra & Brother.

VIII. At all the times hereinbefore mentioned the defendant and the Southern Pacific Company and other carriers duly published and established in accordance with the Interstate Commerce Act and duly filed with the Interstate Commerce Commission at Washington, D. C., certain classi-
12 fications, tariffs and schedules of rates, copies of the material parts of which are hereto annexed, marked Exhibit B, and made a part hereof, which said classifications, tariffs and schedules were in full force and effect at all the times hereinbefore mentioned.

IX. Thereafter and prior to the commencement of this action, said firm of S. Ontra & Brother for a valuable consideration and by an instrument in writing duly assigned to one Douglas F. Cox, of West Orange, New Jersey, any and

all claims and rights of action arising out of the facts above set forth and thereafter and prior to the commencement of this action, said Douglas F. Cox, for a valuable consideration and by an instrument in writing duly assigned to the plaintiff above named any and all claims and rights of action arising out of the facts above set forth and the plaintiff is now the owner of all claims and rights of action arising out of the facts above set forth.

X. The plaintiff claims upon the foregoing 14
facts he is entitled to recover judgment for $17,549.01 with interest from March 10th, 1915, and the defendant claims that upon the foregoing facts the plaintiff is entitled to recover only $5,600, with interest from March 10, 1915.

XI. The controversy hereby submitted for decision is whether or not upon the foregoing facts the plaintiff is entitled to judgment for $17,549.01 with interest from March 10th, 1915, or whether the plaintiff is entitled to judgment, only for $5,600, with interest from March 10, 1915.

XII. The parties agree that the Court shall 15
render such judgment as shall be proper upon the above facts.

JAMES J. E. BURKE,

Plaintiff.

UNION PACIFIC RAILROAD COMPANY,
By C. C. Stillman,

Defendant.

(Seal.)
Attest,
Alex. Millar,
Secretary.

16 *Agreed Statement of Facts.*

State of New York,
County of New York—ss.:

On this 9th day of January, 1917, before me personally appeared James J. Burke, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

ADOLPH HANSEN,
Notary Public,
17 Kings County, No. 186.
Certificate filed in New York County.

State of New York,
County of New York—ss.:

On the 17th day of January, in the year 1917, before me personally came C. C. Stillman to me known, who, being by me duly sworn, did depose and say, that he resided in the City of New York, County of New York and State of New York; that he is the vice president of the Union Pacific Railroad Company, the corporation described in
18 and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Executive Committee of said corporation, and that he signed his name thereto by like order.

E. E. CABLE,
Notary Public,
Kings Co.
Certificate filed in New York Co.

(Seal.)

Affidavit of James J. E. Burke.

61

NEW YORK SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

62

State of New York,
County of New York—ss.:

James J. E. Burke, being duly sworn, says: I am the plaintiff above-named; the controversy mentioned in the foregoing case and dependent upon the facts stated herein and herewith submitted to the Supreme Court of the State of New York, Appellate Division, First Department, for decision thereof is real and the submission thereof is made in good faith for the purpose of determining the rights of the parties.

63

JAMES J. E. BURKE.

Sworn to before me this
9th day of January, 1917.

Adolph Hansen,
Notary Public,
Kings County.

Certificate filed in New York County, No. 186.

64

Stipulation.

It is hereby stipulated that the foregoing case, submission and affidavit are true copies of the originals on file in the office of the Clerk of the County of New York and certification thereof is hereby waived.

Dated, February 2nd, 1917.

TIPPLE & PLITT,
Attorneys for Plaintiff,

65

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant.

66

Order of Appellate Division.

At a Term of the Appellate Division of the Supreme Court, for the First Department, held at the Appellate Division Court House, County of New York, on the 13th day of July, 1917.

Present: Hon. John Proctor Clarke, P. J.
Hon. Frank C. Laughlin,
Hon. Francis M. Scott,
Hon. Vernon M. Davis,
Hon. Clarence J. Shearn, J. J.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

A case agreed between the parties above named and duly executed and acknowledged by the plaintiff on the 9th day of January, 1917, and by the defendant on the 17th day of January, 1917, having been filed in the office of the Clerk of the County of New York on the 18th day of January, 1917, and having been submitted to this Court, Now, after hearing Arthur W. Clement, Esq., of counsel for the plaintiff, and Oscar R. Houston,

70 *Order of Appellate Division.*

Esq., of counsel for the defendant, and due deliberation having been had thereon, it is

On motion of Harrington, Bigham & Englar, attorneys for the defendant,

Ordered, unanimously that the plaintiff have judgment against the defendant for the sum of five thousand six hundred dollars ($5,600), with interest from March 10th, 1915, less the defendant's taxable costs and disbursements which are hereby awarded to the defendant.

71 Enter, J. P. C.

Opinion.

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

---

72 Submission of controversy upon an agreed state of facts between James J. E. Burke and the Union Pacific Railroad Company. Judgment for plaintiff.

Argued before Clarke, P. J., and Laughlin, Scott, Davis and Shearn, JJ.

Arthur W. Clement, of New York City (Wilson E. Tipple, of New York City, on the brief), for plaintiff.

Oscar R. Houston, of New York City, for defendant.

SCOTT, J.:

The only question at issue in this controversy is the amount of damages which the plaintiff is entitled to recover for the loss of certain goods shipped from Japan to this country and then transported over defendant's railroad. The liability of defendant is not questioned; the only dispute being as to the amount for which it is liable.

The goods, consisting of 36 cases of merchandise, were shipped from Yokohama, Japan, by 74
the Pacific Mail Steamship Company, to be delivered at New York to the shipper's order. It was carried by the steamship company to San Francisco, and there delivered to the Southern Pacific Company, a common carrier, and by that company transported to its junction with defendant and there delivered to said defendant. While in defendant's hands the property was totally destroyed. As has been said, the defendant concedes its liability, and it is stipulated that the fair, reasonable, and market value of the goods was $17,549.01, for which sum, with interest, the 75
plaintiff demands judgment.

The defendant claims, however, that it is liable for no more than $5,000, with interest. This claim is based upon a clause in the bill of lading issued by the steamship company reading as follows:

"It is expressly agreed that the goods named are hereby valued at not exceeding $100 per package, and, unless a different or other value is expressly written or declared herein, the liability of the companies therefor, in case of the total

76 *Opinion of Appellate Division.*

loss of all or any of the said goods from any cause, shall not exceed $100 per package, and in case of the partial loss or of damage to any of said goods, the liability of the carriers shall not exceed such proportion thereof per package as the loss or damage on each package shall bear to the sum of $100."

This is a very common form of agreement as to value, and has frequently been upheld and enforced (Hart v. Penn. R. R. Co., 112 U. S. 331;
77 Greenwald v. Barrett, 199 N. Y. 170), and it is of no moment that the freight charges do not appear to have been based on this valuation of $100 per package (Reid v. Fargo, 213 Fed., 771-773; affirmed on this point, 241 U. S. 544-551).

It is also apparent that this agreement as to value was intended to apply to any of the successive carriers. The bill of lading was denominated "through bill of lading," and it called for the transportation of the goods "from Yokohama, via San Francisco, to New York." The freight charge was made up of two items, one the ocean rate, and the other the rail rate, and the bill of
78 lading provided that the goods were

"to be transported by the Pacific Mail Steamship Company on board the steamship 'Persia' * * * from Yokohama unto the port of San Francisco, or as near thereto as safe navigation of such vessels shall then permit, * * * and there upon the arrival of said steamer in like condition to be received by and delivered unto the Southern Pacific Company, the Atchison, Topeka & Santa Fe Railway Company, or the Western Pacific Railway Company, or any of them, and thence to be

transported by said company and connecting railroad companies to New York, and there in like condition to be delivered unto * * * order."

And finally the clause fixing the valuation of $100 per package (quoted above) speaks of the liabilities of the "companies," and later of the "carriers," which it would not have done, if it had been intended to limit the effect of the stipulation as to value to the first carrier, viz: the steamship company.

80 The plaintiff, however, contends that, in so far as concerns the transportation of the goods from San Francisco to New York, the shipment must be regarded as being governed exclusively by the provisions of the defendant's filed classifications, tariffs, etc., and the uniform bill of lading on file with the Interstate Commerce Commission, and that since the limitation upon the defendant's liability, contained in the steamship company's bill of lading, is not to be found in any of the classifications, tariffs, or in the uniform bill of lading, the defendant may not avail itself of the agreement as to value. We have no doubt that 81 the Interstate Commerce Act applied to so much of the shipment as was had by rail after the goods had been landed at San Francisco (see Section 1), and inasmuch as the shipper gave no notice that he elected to ship subject to the common law rules of liability, the shipment, so far as concerns defendant, must, we think, be deemed to have been made under the filed classifications and rates and under the terms of the uniform bill of lading, notwithstanding no such

82 *Opinion of Appellate Division.*

bill was in fact ever issued or signed (see Rule 9 of Western Classification No. 3, in force at the time of the shipment and stipulated as a part of the submission). In other words an interstate shipment, whether originating in this country or abroad, is controlled, so far as concerns that portion of the transportation which is interstate, by the Interstate Commerce Law, and the rules, forms of contract, and classifications established in pursuance of that law.

83 Granting this, however, does not serve to sustain the plaintiff's claim. While the filed schedule of classifications, rates, etc., do not in terms provide for such a valuation as was made in this case, and a consequent limitation of the carrier's liability, they do not forbid it. The uniform bill of lading, however, does explicitly so provide. Its third section reads as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges if prepaid) at the place
84 and time of shipment under this bill of lading, *unless a lower value* has been represented in writing by the shipper or *has been agreed upon* or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

This section establishes four alternative measures of value or bases of liability. The first is the invoice value, and the third is "a lower value

agreed upon." The shipment for the loss of which plaintiff seeks to recover damages falls distinctly within this third class. A lower value than the invoice price had been distinctly agreed upon between the initial carrier and the shipper, and had been expressed in the bill of lading. Since, as already said, that agreement was obviously made, not only for the benefit of the initial carrier, but for that of each successive carrier, the defendant is entitled to the benefit of it, precisely as if a bill of lading in the uniform 86
form had been issued, and the agreement as to value had been written into it.

It follows that there must be judgment for the plaintiff for $5,600, with interest, with costs to the defendant. All concur.

87

88

Judgment.

SUPREME COURT,

NEW YORK COUNTY.

NEW YORK COUNTY,

JAMES J. E. BURKE,

Plaintiff,

—against—

89

UNION PACIFIC RAILROAD COMPANY,

Defendant.

A case agreed between the parties above-named and duly executed and acknowledged by the plaintiff on the 9th day of January, 1917, and by the defendant on the 17th day of January, 1917, having been filed in the office of the Clerk of the County of New York on the 18th day of January, 1917, and having been submitted to the Appellate Division of the Supreme Court, for
90 the First Department, and said Appellate Division having duly rendered its decision thereon, and an order having been duly made and entered in the office of the Clerk of said Appellate Division on July 13th, 1917, ordering, adjudging and decreeing that the plaintiff have judgment against the defendant for the sum of five thousand six hundred dollars ($5,600), with interest from March 10th, 1915, less the defendant's taxable costs and disbursements which are hereby awarded to the defendant, and a certified copy

 91

of said order having been duly filed in the office of the Clerk of this Court on the 23rd day of July, 1917, and the costs and disbursements of the defendant having been regularly taxed by the Clerk of this Court at the sum of fifty-three and 92/100 ($53.92) dollars,

Now, on motion of Harrington, Bigham & Englar, attorneys for the defendant, it is

Ordered, adjudged and decreed that the plaintiff James J. E. Burke have judgment against 92
the defendant Union Pacific Railroad Company for the sum of fifty-six hundred dollars plus $803.64 dollars interest in all $6,403.64 dollars less $53.92 dollars costs of the defendant, or a total of $6,349.72 in favor of the plaintiff and that he have execution therefor.

Judgment this 31st day of July, 1917.

WM. F. SCHNEIDER,
Clerk.

93

94 **Order Granting Leave to Appeal.**

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 11th day of October, 1917.

Present: Hon. John Proctor Clarke,
Presiding Justice.
" Francis M. Scott,
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
95 Justices.

JAMES J. E. BURKE,
Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,
Defendant.

The above-named plaintiff having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 23rd day of July, 1917.

96

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Arthur W. Clement in support of said motion, and after hearing Mr. Arthur W. Clement for the motion,

It is hereby ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter, J. P. C.

Notice of Appeal.

SUPREME COURT,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Please take notice that pursuant to leave granted by an order of the Appellate Division, First Department, dated October 11th, 1917, James J. E. Burke, the above-named plaintiff, hereby appeals to the Court of Appeals from the order of the Appellate Division, First Judicial Department, made and entered herein on the 13th day of July, 1917, directing that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of five thousand six hundred dollars and interest less the defendant's costs herein, and from the judgment entered herein pursuant to said order in the office of the Clerk of the County of New York on the 31st day of July, 1917, in favor of the plaintiff and against the defendant in the sum of six thousand three hundred forty-nine and 72/100 dollars ($6,349.72) and said plaintiff ap-

100 *Notice of Appeal.*

peals from each and every part of said judgment and order as well as from the whole thereof.

TIPPLE & PLITT,
Attorneys for Plaintiff,
No. 150 Nassau Street,
Borough of Manhattan,
New York City.

To:
Harrington, Bigham & Englar, Esqs.,
Attorneys for Defendant,
101 No. 64 Wall Street,
New York.

Stipulation.

It is hereby stipulated that the foregoing are true copies of the case, submission and affidavit, of the opinion and order of the Appellate Division of the First Department, of the judgment entered thereon, of the order granting the plaintiff leave to appeal therefrom, and of the notice of appeal therefrom on file in the office of the
102 Clerk of the County of New York; and

It is further stipulated, that the same shall constitute the record of the Court of Appeals for the hearing of the appeal herein and certification thereof is hereby waived.

Dated, January 3rd, 1918.

TIPPLE & PLITT,
Attorneys for Plaintiff-Appellant.

HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant-Respondent.

Clerk's Certificate.

APPELLATE DIVISION
OF THE
SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
Clerk's Office,
NEW YORK COUNTY.

JAMES J. E. BURKE,
Appellant,

—VS.—

UNION PACIFIC RAILROAD COMPANY,
Respondent.

I, ALFRED WAGSTAFF, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy, Remittitur from Court of Appeals, has been compared with the original thereof filed in this office on the 28th day of July, 1919, and that the same is a correct transcript thereof, and of the whole of the said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 1st day of October, 1919.

(Seal.)

ALFRED WAGSTAFF,
Clerk.

106 **Opinion.**

State of New York,]
Court of Appeals, } ss.:
State Reporter's Office,]

I, J. NEWTON FIERO, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of JAMES J. E. BURKE, Appellant, against UNION PACIFIC RAILROAD COMPANY, Respondent, decided by the Court of Appeals on the Fifteenth day of July, 1919, with
107 the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 30th day of September, 1919.

J. NEWTON FIERO,
As Reporter of the Court of Appeals
of the State of New York.

108

ATTEST:

(L. S.) R. M. BARBER,
Clerk of the Court of Appeals.

(Seal.)

State of New York,
Court of Appeals.

I, FRANK H. HISCOCK, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said Court, having custody of the seal of said Court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said Court, having custody of the official opinions, written 110
and handed down by said Court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of James J. E. Burke, appellant, against Union Pacific Railroad Company, Respondent, decided by the said Court of Appeals on the fifteenth day of September, 1919, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the
seal imprinted thereon is the true and genuine 111
seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said Court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said Court, appended thereto is the true and genuine signature of said J. Newton Fiero.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of

112 *Opinion.*

said Court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 30th day of September, in the year One thousand nine hundred and nineteen.

FRANK H. HISCOCK,
As Chief Judge of the Court of Appeals of the State of New York.

---

113 JAMES J. E. BURKE, Appellant, *v.* UNION PACIFIC RAILROAD COMPANY, Respondent.

(Decided July 15, 1919.)

APPEAL, by permission, from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered July 31st, 1917, in favor of plaintiff, upon the submission of a controversy pursuant to section 1279 of the Code of Civil Procedure.

The nature of the action and the facts, so far
114 as material, are stated in the opinion.

Arthur W. Clement for the appellant.
Oscar R. Houston for the respondent.

COLLIN, J. The plaintiff, in virtue of an assignment vesting in him the right, seeks to recover the sum of the invoice price of value of goods destroyed while in the possession of the defendant as a common carrier, to wit, the sum of $17,549.01. The defendant, conceding a liability, asserts that, because of the agreed valuation of

the goods and a corresponding limitation, it does not exceed the sum of $5,600. The Appellate Division gave the plaintiff judgment for the latter sum, with interest.

The goods, consisting of fifty-six cases, were delivered, March 10, 1915, at Yokohama, Japan, to the Pacific Mail Steamship Company for transportation to New York City, to be there delivered to the shippers' order. A bill of lading was then and there delivered by the company to and accepted by the shippers. It contained the provision: "It is expressly agreed that the goods 116
named in this Bill of Lading are hereby valued at not exceeding $100.00 per package, and unless a different or other value is expressly written and declared herein, the liability of the Companies therefor, in case of the total loss of all or any of the said goods from any cause, shall not exceed $100.00 per package, * * *." It did not express or declare a different value. The goods at San Francisco were by the company delivered to the Southern Pacific Company, as a connecting carrier, which delivered them to the defendant, as a connecting carrier, and were 117
totally destroyed while being transported by the defendant. Their invoice value was $17,549.01. No part of the freight was paid. We are to determine whether or not the liability of the defendant is limited by the agreed valuation.

The Southern Pacific Company, the defendant and the other inland carriers were, of course, subject to the federal act to regulate commerce, and had duly established and filed with the interstate commerce commission certain classifications, tariffs and schedule of rates which were

applicable to the transportation from San Francisco to New York City. (*Armour Packing Co.* v. *United States*, 209 U. S. 56, 77.) The transportation from San Francisco being interstate, the laws of Congress and the decisions of the United States Supreme Court, are, of course, so far as applicable, binding. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Chicago, Burlington & Q. Ry. Co.* v. *Miller*, 226 U S. 513.) The Carmack Amendment of January 29, 1906, declared that any common carrier receiving property for transportation from a point in one state 119 to a point in another state shall issue a receipt or bill of lading therefor, and denied to an initial carrier the former right to make a contract limiting its liability to its own line. Beyond controversy transportation by ocean carriers between the United States and non-adjacent foreign countries is not included in or affected by the act to regulate commerce and the jurisdiction of the interstate commerce commission or the classification and schedule of rates and charges pursuant to the act, cannot extend to carriers engaged in that transportation. (*Cosmopolitan* 120 *Shipping Co.* v. *Hamburg-American Packet Co.*, 13 Interstate Com. Commission Rep. 266; *Chamber of Commerce of N. Y.* v. *N. Y. C. & H. R. R. Co.*, 24 Interstate Com. Commission Rep. 55.) Interstate rates and charges to and from ports of entry must be published and filed as independent from the ocean transportation. Ocean transportation may be conducted under through bills of lading, issued at a foreign port, but the classifications and schedules of rates and charges of the inland carrier or carriers must be

limited to inland transportation and services 121
and cannot relate to liability, service or obligation of the ocean carrier. (*Armour Packing Co. v. United States*, 209 U. S. 56, 77; *Pacific Mail S. S. Co. v. Western Pacific R. Co.*, 251 Fed. Rep. 218.)

The bill of lading delivered by the steamship company was a through bill, issued, manifestly, in arrangement with and in the behalf of the inland connecting carriers. The rate for the inland transportation was stated in it separately from that of the ocean transportation and as one hundred and twenty-five cents per one hun- 122
dred pounds in minimum carloads of thirty thousand pounds. Such was the rate fixed for the inland transportation by the classifications and schedule of rates and charges established and duly filed by the inland carriers. The bill of lading contained this clause: "In consideration of the rate of freight herein named it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, on the face and on the back hereof, and said conditions are hereby agreed to by the shipper and by him accepted for him- 123
self and assigns as just and reasonable." The agreed valuation of the goods at one hundred dollars per package and limiting the liability of the companies to a sum not exceeding that valuation was a condition of the bill. The filed classifications and schedules did not contain an agreed valuation, controlling in form, the shippers' recovery in case the goods were lost, similar to that I have quoted from the bill of lading. No bill of lading other than that delivered to the shippers by the steamship company was issued.

124 The permissibility of limiting the recovery, in case of liability, to a valuation of the freight agreed upon or declared by the shipper is conclusively estabished. (*Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Robinson*, 233 U. S. 173; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389.) The Cummins Amendment relating to the permissibility need not be heeded here because it was not effective prior to June 2, 1915, and the goods were shipped March 10, 1915. The permissibility must, how-
125 ever, be shown or declared by the established and filed classifications and schedule of rates and charges and in accordance with them invoked and executed. (*Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.)

The liability of the defendant is not and, under the Carmack Amendment, could not be questioned. (*Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas Packing Co.*, 244 U. S. 31.) The plaintiff asserts and argues that the agreed valuation in the instant case, if there was an agreed
126 valuation, was not valid and effective, because the charge made for the inland transportation was not based upon the agreed valuation. The plaintiff states in his brief: "It is a fixed requirement of all the Federal decisions that an 'agreed valuation' to be valid must be supported by a freight rate based upon it, or, in other words, the shipper must have obtained a lower freight rate in consideration of agreeing to the limited valuation of his shipment." In judicial opinion and decisions there is support for the

assertion of the appellant. In a leading case 127
(*Hart* v. *Penn. R. Co.*, 112 U. S. 331) the plaintiff, a shipper, sought to recover of the defendant, a carrier, the market value of horses killed or injured in transportation under a bill of lading containing an agreed valuation as the extent of liability. The Court said: "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that, as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the 128
agreed valuation named, the rate of freight is graduated by the valuation. * * * The distinct ground of our decision in the case at bar is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which 129
the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." The doctrine that an agreed valuation, when made the basis for a rate, is given effect in measuring the damages and limiting the shipper's recovery, was not abrogated or changed by the Carmack Amendment. (*American Express Co.* v. *United States Horse Shoe Co.*, 244 U. S. 58, 62; *Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278; *Kansas City*

130 *So. Ry. Co.* v. *Carl*, 227 U. S. 639; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Chicago R. I. & Pac. Ry. Co.* v. *Cramer*, 232 U. S. 490; *Western Transit Co.* v. *Leslie & Co.*, 242 U. S. 448; *Boyle* v. *Bush Terminal R. R. Co.*, 210 N. Y. 389; *D'Utassy* v. *Barrett*, 219 N. Y. 420; *Moore* v. *Duncan*, 237 Fed. Rep. 780.) Stipulations for an agreed value, when made the basis for the rate, are not agreements for exemptions from negligence and are given effect upon the ground of estoppel. (*Boston & Maine Railroad* v. *Piper*, 246 U. S. 439; *D'Utassy* v. *Barrett*, 219 N. Y. 420.)

131 The validity of a contract limiting the carrier's liability to an agreed valuation does not depend upon the relation of that value to the actual value. It rests upon the proposition that, by freely and deliberately electing to contract for carriage at a rate of compensation based upon an agreed value, the shipper is estopped to claim a higher value in case the shipment is lost or destroyed. (*Pierce Co.* v. *Wells, Fargo & Co.*, 236 U. S. 278, 283; *Kansas City So. Ry. Co.* v. *Carl*, 227 U. S. 639; *Boston & Maine Railroad* v. *Piper*, 246 U. S. 439.) Under this proposition and the authorities the agreed or released

132 valuation is valid and effective as the extent of a loss only when it is related to the rate charged for transportation. The shipper cannot be estopped by an agreement or declaration concerning value which in no way or extent effect the tariff or conduct of the carrier. The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of the agreed valuation limitation and relief from full liability. (*Cincinnati, New Orleans & Texas Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327.)

We are thus brought to the ultimate and determinative question whether or not the facts in the case at bar disclose a relation between the agreed valuation and the rate charged. The bill of lading declared in the parts we have already quoted a relation, that is, in consideration of the rate of freight the valuation is agreed upon as a condition of the transportation. It fulfilled the requirement of the Carmack Amendment that the initial carrier shall issue a bill of lading. It contains agreements of the parties, intended manifestly to bind the connecting carriers, and 134
it and the filed classifications and schedules constitute the entire contract under which the inland or rail transportation is performed. Any provision in it inconsistent with a content of the classifications or schedules is void. It is not now open to discussion that the duly established and filed rates are absolutely binding upon all persons who are parties to a contract of interstate transportation. They have the force of a statute. They cannot be varied under any pretext. No party can lawfully depart from them (*Louisville & Nashville Railroad* v. *Maxwell*, 237 U. S. 94, 97; *Dayton Coal & Iron Co., Ltd.*, v. *Cincinnati, New Orleans & Texas Pac. Ry.*, 239 U. S. 446; *Erie Railroad Co.* v. *Stone*, 244 U. S. 332.) The filed classifications and schedules did not sanction the right of the parties to fix the agreed valuation as a limitation upon the extent of the liability of the connecting carriers. By force of provisions of the classification, which need not here be set out at length, the uniform bill of lading, "Straight," was a part of the classification and related to and governed the terms of the transportation eastward from San

Francisco. The classification created, in effect, the alternatives of shipping from San Francisco under (a) the straight uniform bill of lading at the rate and upon the conditions named in it, or (b) "the liability imposed upon common carriers by common law and the federal and state statutes applicable thereto, * * * and the rate charged therefor will be ten per cent. (10%) higher (subject to a minimum increase of one (1) cen. per hundred pounds) than the rate charged for property shipped subject to all the terms and conditions of the Uniform Bill of Lading." The uniform bill of lading, under which, as we have stated, the goods moved from San Francisco, provided: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona-fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence." It fixed the one rate of one hundred and twenty-five cents per one hundred pounds, carload lots of minimum of thirty thousand pounds, that is the same rate as was fixed by the original bill of lading. A lesser rate for a valuation less than "the value of the property being the *bona-fide* invoice price, if any, to the consignee, including the freight charges, if pre-

paid at the place and time of shipment under this bill of lading" was not prescribed or presented to the shipper. There was not a rate adjustable to the agreed valuation in the original bill of lading. There was no relation between that valuation and the rate fixed in the uniform bill of lading and the original bill of lading. The agreed valuation worked no change in the situation of the connecting carriers. The rate was made relative to another and different valuation, namely, the valuation prescribed in the uniform bill of lading. There was neither two or more 140
rates based upon valuation nor the opportunity for a valuation by the shipper for the purpose of the rate and the liability. In this it differs from the case of *Cleveland, Cincinnati, Chicago & St. Louis Ry.* v. *Dettlebach* (239 U. S. 588) in which the trial court found as a fact that the shipper by consenting to the limited valuation received a consideration in the shape of a substantial reduction in the freight rate. While the provision of the straight uniform bill of lading we have quoted declared that an agreed lower valuation shall be the maximum amount to 141
govern the computation of any loss or damage a lower rate is not offered to or obtainable by the shipper because of it. There is not the basis of an estoppel as against him. Under the principle and authorities we have stated the plaintiff was entitled to recover the invoice value of the goods.

We find nothing relevant to this phase of the problem in the case of *Reid* v. *Fargo* (213 Fed. Rep. 771; 241 U. S. 544), upon which the respondent relies. There was there no interference,

through classification or schedules, with the initial and only bill of lading. Ocean transportation alone was involved. The bill of lading declared: "It is also mutually agreed that the value of each package shipped hereunder does not exceed $100, or its equivalent in English currency, on which basis the freight is adjusted, and the carrier's liability shall in no case exceed that sum, unless a value in excess thereof be specially declared, and stated herein, and extra freight as may be agreed on paid." Proof in
143 contradiction of this statement was not offered. Where a bill of lading duly delivered and accepted declares that lawful alternate rates based on specific values were offered, such declaration constitutes an admission by the shipper and sufficient *prima facie* evidence of choice. (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Rankin*, 241 U. S. 319.)

The judgment should be reversed and judgment rendered in favor of the plaintiff and against the defendant for the sum of seventeen thousand, five hundred and forty-nine dollars
144 and one cent, with interest from March 10, 1915, with costs in this court and in the Appellate Division.

CHASE, CUDDEBACK, MCLAUGHLIN and ANDREWS, JJ., concur; HOGAN, J., dissents; CRANE, J., not sitting.

Judgment accordingly.

Order of Appellate Division

At a Term of the Appellate Division of the Supreme Court, State of New York, held in and for First Judicial Department at the Court House, in the County of New York on the 28th day of July, 1919.

Present—Hon. John Proctor Clarke,
Presiding Justice,
" Victor J. Dowling,
" Walter Lloyd Smith,
" Alfred R. Page,
" Eugene A. Philbin,
Justices.

James J. E. Burke,
Plaintiff-Appellant,
—against—
Union Pacific Railroad Company,
Defendant-Respondent.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, First Department, dated the 13th day of July, 1917, directing that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of Fifty-six hundred dollars, and interest less defendant's costs, and from the judgment entered pursuant to said order in the office of the Clerk of the County of New York, on the 31st day of July, 1917, in favor of the plaintiff and against the defendant for the sum

148 *Order of Appellate Division.*

of six thousand three hundred forty-nine and 72/100 dollars; and this said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment of the Appellate Djvision of the Supreme Court, appealed from herein as aforesaid be reversed and judgment granted in favor of the plaintiff and against the defendant for the sum of Seventeen thousand five hundred forty-nine and 1/100 dollars, with interest from March 10th, 1915, with
149 costs in this Court, and in the Appellate Division, and having further ordered and adjudged that the proceedings therein be remitted to the Appellate Division to the Supreme Court there to be proceeded upon according to law.

Now on reading and filing the remittitur from the Court of Appeals therein and upon motion of Tipple & Plitt, attorneys for the plaintiff herein it is.

Ordered that the said judgment of the Court
150 of Appeals be and the same hereby is made the judgment of this Court.

Clerk's Certificate. 151

APPELLATE DIVISION

OF THE

SUPREME COURT,

FIRST JUDICIAL DEPARTMENT,

Clerk's Office,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Appellant. 152

—VS.—

UNION PACIFIC RAILROAD COMPANY,

Respondent.

I, ALFRED WAGSTAFF, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing copy order has been compared with the original thereof filed in this office on the 28th day of July, 1919, and that the same is a correct transcript thereof, and of the whole of the said original. 153

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court in the County of New York, this 3rd day of October, 1919.

[SEAL]

ALFRED WAGSTAFF,
Clerk.

154 **Judgment.**

SUPREME COURT,

NEW YORK COUNTY.

JAMES J. E. BURKE,

Plaintiff,

—against—

UNION PACIFIC RAILROAD COMPANY,

Defendant.

155 ---

A case agreed between the parties above named and duly executed and acknowledged having been submitted to the Supreme Court, Appellate Division, First Department, and the Appellate Division, First Department, having by order dated the 13th day of July, 1917, directed that judgment be entered in favor of the plaintiff and against the defendant in the sum of five thousand six hundred ($5,600) dollars with interest less defendant's costs and judgment having been entered thereon on the 31st day of July, 1917, in favor
156 of the plaintiff and against the defendant in the sum of six thousand three hundred forty-nine and 72/100 ($6,349.72) dollars and the plaintiff having appealed therefrom to the Court of Appeals and the said Court of Appeals having sent hither its remittitur filed in the office of the Appellate Division, First Department on the 28th day of July, 1919, by which it appears that the said Court of Appeals has reversed the said judgment of the Appellate Division, First Department, and granted judgment in favor of the

157

plaintiff and against the defendant for seventeen thousand five hundred forty-nine and 1/100 ($17,549.01) dollars with interest from March 10th, 1915, and with costs in that Court and in the Appellate Division and has given judgment accordingly and has remitted the judgment of said Court of Appeals to the Appellate Division, First Department to be enforced according to law, and the Appellate Division, First Department, having by an order dated the 28th day of July, 1919, a duly certified copy of which has been filed with the Clerk of this Court on the 5th day of August, 1919, ordered that said judgment be made the judgment of this Court and the plaintiff's costs having been duly taxed at the sum of two hundred eighty-nine and 57/100 dollars, now on motion of Tipple & Plitt, attorneys for the plaintiff, it is

158

ADJUDGED that the plaintiff James J. E. Burke have judgment against the defendant the Union Pacific Railroad Company for the sum of seventeen thousand five hundred forty-nine and 01/100 ($17,549.01) dollars, together with $4,661.96 interest and $289.57 dollars, costs making in all the sum of twenty-two thousand five hundred and 54/100 dollars, and that said plaintiff have execution accordingly.

159

Dated, New York, August 14th, 1919.

WM. F. SCHNEIDER,
Clerk.

160

Clerk's Certificate.

State of New York,
County of New York—ss.:

I. WILLIAM F. SCHNEIDER, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, That I have compared the preceding with the original judgment on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

Indorsed filed, August 14th, 1919, 11 h. 5 m.

161

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal, this 4th day of October, 1919.

WILLIAM F. SCHNEIDER,
Clerk.

[SEAL]

162

2124—1917.

530.

Supreme Court. New York County.

JAMES J. E. BURKE, Plaintiff-Appellee,

against

UNION PACIFIC RAILROAD COMPANY, Defendant-Appellant.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that the certified transcript of the record in this action filed with the Clerk of the Supreme Court of the United States with the petition for a writ of certiorari to the Supreme Court of the State of New York, may be taken as the return to the writ of certiorari granted herein by the Supreme Court of the United States on the seventeenth day of November, 1919.

Dated, New York, November 24, 1919.

TIPPLE & PLITT,
Attorneys for Plaintiff.
HARRINGTON, BIGHAM & ENGLAR,
Attorneys for Defendant.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Being informed that there is now pending before you a suit in which James J. E. Burke is plaintiff, and Union Pacific Railroad Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of November, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

No. —.

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the proceding with the original certificate of Writ of Certiorari and Stipulation on file in my office, and that the same is a correct Transcript therefrom, and of the whole of such original.

Indorsed Filed Dec. 9-1919.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, this 24 day of Jan., 1920.

WM. F. SCHNEIDER,
Clerk.

F. J. G.

[Endorsed:] 2124-1917. Supreme Court of the United States, No. 568, October Term, 1919. Union Pacific Railroad Company vs. James J. E. Burke. Office of the Clerk. Supreme Court U. S. Received Jan. 26, 1920. Writ of Certiorari. Filed Dec. 9, 1919.

[Endorsed:] File No. 27,323. Supreme Court U. S. October Term, 1919. Term No. 568. Union Pacific R. R. Co., Petitioner, vs. James J. E. Burke. Writ of certiorari and return. Filed Jan. 26, 1920.